Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C 20554

In the Matter of	)	
	)	
Implementation of Section 273(d)(5)	)	GC Docket No. 96-42
as amended by the Telecommunications Act	)	
of 1996 – Dispute Resolution Regarding	)	
Equipment Standards	)	

REPLY OF BELL COMMUNICATIONS RESEARCH, INC. IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

April 11, 1996

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REPLY OF BELL COMMUNICATIONS RESEARCH, INC.

To: The Commission

Bell Communications Research, Inc. ("Bellcore") respectfully files its reply in this proceeding, which is addressing alternate resolution of technical disputes under Section 273(d) of the Telecommunications Act of 1996. In its Comments, Bellcore focused on its own generic requirements activities, noting that Section 273(d) encompasses a variety of entities and activities. Bellcore emphasized the importance of its proposed generic requirements to funding parties, who bear the substantial expense of their development, and to the public, which benefits from the increased competition, innovation, interoperability and network reliability/integrity that they help promote.

We noted that the alternate dispute resolution provisions of Section 273(d) struck a careful balance to ensure that the generic requirements process would not be materially impaired, by limiting its application to funding parties and to addressing technical issues disputed with the issuing entity, by requiring that all issues be resolved within 30 days, and by requiring that government involvement be limited.

Bellcore recommended against the use of binding arbitration, as did all other parties filing comments. We urged that flexibility be accorded the funding parties to select among multiple

dispute resolution techniques and forums, including two that we believe may expeditiously and simply dispose of many technical disputes, escalation within the issuing entity (to personnel other than those who prepared the disputed document) and resolution by a vote of a majority in interest of the funding parties,[1] and referral to another body (which could be, but should not automatically be, an accredited standards organization), for mediation-recommendation. We proposed that these alternatives be described in the Commission's rules, along with a specific tri-partite mediation-recommendation approach to be used if a majority of the funding parties selects it or if they fail to agree on an alternative.

Bellcore's approach is fair to all parties. Any interested member of the industry is free to respond to the public invitation to share the funding of a generic requirement on a reasonable and non-discriminatory basis and, if so, the disputing funding party will have the opportunity to be heard, beyond the comments it files, in any of the alternatives which Bellcore has proposed.[2] Under each of the options the funding parties might select, there will be open consideration of the disputing funding party's views by personnel other than those who prepared the disputed document. While the conclusions of the dispute resolution panel would not be binding, we would expect them presumptively to resolve the dispute. Even if the mediation-recommendation approach were used, only a majority of the funding parties could reject or modify the result, and if

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1 It is important to note that as a variety of funding parties - some new and some old - participate in Bellcore's generic requirements development efforts pursuant to Section 273(d)(4)(A)(ii), the composition of majorities will be dynamic, shifting with issues and from project to project, based on their own individual interests.

2 In the past, Bellcore voluntarily published draft documents and accepted comments. Now, the statute provides funding parties the right not only to provide such comments, but also to invoke alternate dispute resolution processes to resolve technical disputes with the issuing entity.

they take such action they would be required to articulate their reasons for doing so.[3]

Comments of Bell Atlantic and BellSouth are consistent with and support Bellcore's proposal. US West emphasizes mediation, one of Bellcore's proposed alternatives. Comments of Corning, Inc. ("Corning") and the Telecommunications Industry Association ("TIA") are not consistent with Bellcore's proposal because of their emphasis on a single, mandatory approach, one which is unfair and has significant flaws.

Corning Comments

Corning filed its comments early, and Bellcore addressed them in its Comments. Corning's proposal will not comply with Section 273(d), in that it would return issues to the issuing organization as "open" and not resolved in the statutory 30 day period.[4] Corning's proposal is unfair in that it would bar funding parties' personnel from participating in dispute resolution (although they are vitally interested in the subject matter, and are likely to have relevant expertise),[5] disenfranchising the carriers who presently fund Bellcore's generic requirements

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[3] In this regard, we considered and rejected requiring a super-majority for such action. Imposition of super-majority decisionmaking on resolution of difficult technical issues is likely, in Bellcore's view, to leave issues unresolved, and therefore impede innovation and interoperability of services and networks.

[4] Corning Comments, Attachment A, Section 2.1 ("return the proposed standard or requirement to the List of Open Issues") and 9 ("Once an item appears on the industry-reviewed unresolved issues list it would remain open for final resolution by the relevant [standards development organization] or by a [non-accredited standards development organization] at some future date."). The value of generic requirements, which are entirely non-binding, lies in their technical quality and persuasiveness. If a key part of a generic requirement is termed "open" or "unresolved," this will simply sow confusion in the industry, detract from its usefulness, and encourage vendors to develop proprietary solutions that do not promote interoperability and substitutability of competitive alternatives. The net effect will be an adverse effect on innovation, competition, interoperability and reliability.

[5] *Id.* at 8, n. 11 ("make its determination by consensus excluding those members affiliated with the [non-accredited standards development organization] . . . . ")

process.

Furthermore, Corning's proposal does not have sufficient flexibility. Corning would preselect a particular type of standards body for alternative dispute resolution (a "product"-directed standards body such as TIA[6]) while excluding other bodies that may have relevant expertise,[7] and other dispute resolution techniques that might expeditiously dispose of a given dispute. These undermine achievement of the goals of Section 273(d), *i.e.*, enabling interested parties to "influence the final resolution of the dispute without significantly impairing the efficiency, timeliness, and technical quality of the activity."[8]

In contrast, Bellcore's proposal retains the benefits of referral to a standards body when the funders judge this is appropriate to meet the need for timely and high quality results, while avoiding the foregoing infirmities.

Telecommunications Industry Association

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6 *Id.* at 8. It seems clear that the organization to which Corning is proposing that disputes be referred is the TIA. Corning's comments refer specifically to the TIA in its definition of "product class," Attachment A (Definitions). Corning proposes that disputes be referred to an "Engineering Committee" of the standards body, which is a term used by TIA. The Commission recently noted that, "TIA's technical work is conducted through its Engineering Committees, which develop, maintain and publish voluntary standards and technical reports." *Part 68 of the Commission's Rules*, FCC 96-39, released Feb. 29, 1996, at 4, n.7.

7 *E.g.*, the ANSI-accredited Committee T1 that addresses United States telecommunications network standards.

8 Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 458, S. Rep. No. 230, 104th Cong., 2d Sess. at 154-55 (1996). Finally, it might be noted that Corning proposes that if its preferred dispute resolution panel decides to withhold support for the non-accredited standards development organization's position, the issue is to appear on a list of unresolved issues and "could not be included as a resolved issue in the published industry-wide standard or generic requirement." *Id.*, 9. If this is to be a government-mandated result, it would impair Bellcore's First Amendment publication rights, *see e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) and cases cited therein.

TIA, an association of manufacturers, has submitted a filing endorsing the Corning proposal (with certain technical corrections), including the notion that disputed issues can be returned without a decision within the 30 day statutory period. Although neither of these are at issue in this proceeding, TIA proposes that the Commission nullify the statutory requirement that the Section 273(d)(5) procedures be limited to "funding parties," and TIA also invites the Commission to address funding levels.

While Corning is proposing that disputes be referred to a body "accredited by ANSI to develop standards for the relevant class of product," and it appears that TIA is the body Corning has in mind,[9] neither Corning nor TIA has noted that TIA, as the sole accredited U.S. developer of standards addressing various kinds of network equipment (*e.g.*, fiber), would necessarily be the only U.S. standards organization to which technical disputes concerning such equipment would be referred under Corning's proposal. Indeed, TIA in its Comments has not acknowledged its standards development role.

Neither Corning nor TIA has noted that TIA's Engineering Committees are unlikely to be able even to meet let alone to reach an informed decision in the 30 day statutory period.[10] Moreover, the representatives may not and need not be neutral on the matter in dispute, and that difficulty is compounded if the reference is made to a smaller subgroup of an Engineering

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9 *Supra* note 6.

10 Meeting notice requirements in such bodies are a problem. TIA's procedures require that the Engineering Committee chair provide meeting information four weeks in advance; Committee T1's procedures for a comparable group require 30 days notice. Also, in the case of TIA, subject matter experts for a particular topic may not be present at Engineering Committee meetings because they participate in subgroup meetings, which are frequently held at different times and places from the Engineering Committee.

Committee, where much of the expertise resides.[11] Neutrality is not a requirement for membership or participation in accredited standards organizations, and TIA is no exception. TIA supports the Corning proposal that technical issues may be returned for further action without a decision,[12] failing to meet both the statutory time limit and the needs of users of proposed generic requirements.

There was no Congressional debate on Section 273(d), only proposals by a number of parties that resulted in the statutory language [13] That language included provisions that dispute resolution be limited to funding parties, and that there be resolution of the dispute within 30 days, both of which were crucial to Bellcore's ability to continue to perform effective and timely generic requirement development.

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[11] While Corning describes the processes of accredited standards organizations as balanced, TIA does not make this claim for its committees and their subgroups. TIA knows that balance is not a requirement at their Engineering Committee level (by membership or eligibility preference for chair positions), nor at the subgroup level where relevant expertise might actually exist. A benefit of Bellcore's proposed fallback tri-partite dispute resolution procedure, and the requirement that an explanation be provided if the funding parties decide not to implement the result thereof, is that regardless of how biased the participants are feared or perceived to be, such bias is nullified.

[12] Bellcore participates in some TIA standards activities. Based on its experience, Bellcore believes it very unlikely that TIA committees or subgroups with anything like a reasonably full complement of members, could meet and resolve technical issues within the statutory time limit to meet the needs of those funding Bellcore's proposed generic requirements. As noted, *supra* note 10, meeting notice requirements could be a problem. However, if a standards development organization small group could be convened quickly, there is no assurance whatsoever that such a group would be neutral or disinterested, that those carriers that presently fund and are vitally interested in Bellcore's generic requirements work would be represented at all in such a group or the voting, or represented in a manner that reflects their funding of the affected requirements work.

[13] While it is perhaps of interest to the Commission that TIA, aligned with Corning, last summer discussed with Bellcore an amendment to pending bills directed at Bellcore which ultimately was modified to its present form in the Act, it is an overstatement to characterize this as participating "in the Congressional debate on section 273(d)." TIA Comments, 2.

TIA's attempt to substitute a performance bond for statutory requirements in Section 273(d)(4) and (d)(5) addressing "funding" is inconsistent with the clear and unambiguous adopted language.[14] TIA proposes to substitute for the statutory requirement of funding, a "purpose" of their own invention: ensuring that a party has "a genuine interest in the proceeding."[15] This purpose appears nowhere in the text of the statute nor in any Committee report.

Indeed, if a vague genuine interest and not actual funding is to be the standard, this could further open the door to a variety of ill-motivated though colorable "technical" disputes that the Section 273(d)(5) process should not promote A company might be "interested" in delaying adoption of a perfectly reasonable proposed generic requirement under which its product would test badly. Another might be "interested" in stymieing issuance of a generic requirement which would enable potential competitors to offer interoperable and compatible products, to capture or retain a market for its own proprietary solutions. Such interests might be "genuine" (at least in the minds of their proponents), but they would be inconsistent with the public interest.

Funding is the interest the Act recognizes, and with good reason. Substitution of a bond premium for a real investment in the process will make disputes for purposes of delay less

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[14] TIA is proposing that the Commission ignore provisions addressing: (1) the public invitation to fund and participate (Section 273(d)(4)(A)(ii)); (2) comments of "any funding party" be included in the publication of the final text on request (Section 273(d)(4)(A)(iv)); and (3) "any funding party" have the ability to invoke dispute resolution (Section 273(d)(4)(A)(v)). *Id.* at 3. Also, the text of subsections (A)(iii) and (A)(iv) make clear that comments and other participation by a funding party in the generic requirement development process are not a substitute for funding - indeed, the right to provide comments and otherwise participate in the activity (*e.g,* establishment of an industrywide generic requirement by a non-accredited standards development organization) is only accorded to parties that first agree to fund such activity. Section 273(d)(4)(A)(ii),(iii) and (v). This construction is consistent with past practice, which has never equated a performance bond premium or a comment on a generic requirement with the funding of its development - at considerable cost - by Bellcore's professional staff.

[15] *Id.*, 3-4.

expensive for the disputant and more disadvantageous to those who fund the delayed work. Assuming that such a bond were defined – which TIA has failed to do – it would be unlikely to begin to cover the real losses to funders, and to the development organization, resulting from delays and uncertainty. The proposed performance bond approach would impose a "non-funding" regime, which would undermine the viability of generic requirements generation, and achievement of the previously-described benefits to the industry and to the public (*i.e.*, promotion of innovation, competition, interoperability and reliability). Had Congress wished the standard now advanced by TIA to govern Section 273(d)(4)-(5), it would and could have said so.

Finally, TIA improperly seeks to address in this proceeding the level of funding that funding parties are to provide. TIA, apparently anticipating that it, or its members, will be asked to pay a fair share of the cost of developing generic requirements proposals at Bellcore, attempts here to induce the Commission to address prices that have not yet even been established.[16] However, this proceeding is concerned with dispute resolution under Section 273(d)(5), and not the level of funding to be provided. Nevertheless, it might be noted that the statutory requirement is that the non-accredited standards development organization issue a public invitation to interested industry parties "to fund and participate in such efforts on a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party."[17]

While Congress provided no guidance on how funding on a reasonable and

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[16] *Id.*, 4 ("They were not included as a way to increase the revenues or offset expenses of the non-accredited [standards development organization]. It is for that reason that a reasonable amount should not be defined as the amount contributed today by any party funding these activities, but rather as any amount that demonstrates the party shows a responsible interest in the proceeding.").

[17] Section 273(d)(4)(A)(ii).

nondiscriminatory basis is to be weighed, it did not in any manner suggest, as TIA does, that such funding is not to be used to offset expenses of the non-accredited standards development organization. Such a result would be inconsistent with a reasonable construction of "nondiscriminatory." The costs incurred by the non-accredited standards development organization in developing the relevant generic requirement are relevant costs to be borne by funders, and they must ultimately be covered if the non-accredited standards development organization's activities are to continue. What TIA is proposing is that some funders receive services without defraying relevant costs, while others receiving like services bear them. Comparable coverage of cost by recipients of like service has long been a touchstone of analysis of discrimination under analogous provisions of Section 202(a) of the Act.[18]

Conclusion

Bellcore reiterates that its generic requirements are important, that they promote efficiency and competition, and that they provide benefits to their funders and to the public. The dispute resolution process, while providing each funding party the opportunity to have its technical concerns heard and considered, should not be permitted to undermine these benefits.

Bellcore believes, for the reasons set forth in its Comments and in this Reply, that the process which Bellcore has recommended meets the statutory goals and requirements, and that the dispute resolution alternatives proposed by Corning and TIA do not. We emphasize that

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[18] *E.g,* Western Union International, Inc. v. FCC, 568 F.2d 1012, 1017-18 (2d Cir. 1977), *cert. denied,* 436 U.S. 944 (1978); American Trucking Ass'n v. FCC, 377 F.2d 121, 239-31 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967); Am. Broadcasting Co. v. FCC, 663 F.2d 133, 137 (D.C.Cir. 1980) *citing* Sports Network, Inc. v. AT&T, 25 FCC2d 560 (1968) *aff'd* 25 FCC2d 550 (Review Bd. 1970), 34 FCC2d 691 (1972); MCI v. FCC 712 F.2d 517, 532, n. 17 (D.C.Cir. 1983); MCI Telecomm. Corp. v. FCC 917 F.2d 30, 39 (D.C.Cir. 1990).

recommendation procedure to serve as the Commission's prescribed fallback in the event of a deadlock. Each and every funding party disputant will have a fair opportunity to have its concerns heard in an open, non-discriminatory manner, but it should not be able to deprive the majority of funders of their right to obtain the complete, professional and timely technical information which they are paying for, and which they need to provide the high-quality, interoperable telecommunications services and networks that the public expects.

Respectfully submitted,

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April 11, 1996

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CERTIFICATE OF SERVICE

I, Monica Mollahan, certify that this eleventh day of April, 1996, I mailed, First Class mail postage prepaid, copies of the foregoing "Comments of Bell Communications Research, Inc. in Response to Notice of Proposed Rulemaking" in GC Docket No. 96-42 to the following:

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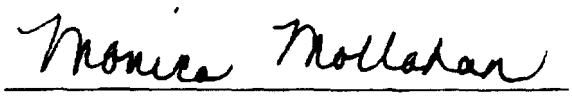

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